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Via Electronic Delivery

December 9,2002

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: CG Docket No, 02-278, CC Docket No. 92-90, FCC 02-250

Dear Ms. Dortch:

This letter **is** submitted on behalf of Mastercard International Incorporated ("Mastercard)' in response to the Notice of Proposed Rulemaking and Memorandum Opinion and Order ("Proposal") published by the Federal Communications Commission ("FCC") regarding the rules and regulations ("Existing Rule") implementing the Telephone Consumer Protection Act of 1991 ("TCPA). Mastercard appreciates the opportunity to provide its comments on the Proposal.

INTRODUCTION

The Proposal, as well as the Existing Rule, touch on significant, potentially competing interests which should be carefully weighed before any changes are adopted by the FCC. On one hand, it **is** important that any final rule ensure that consumers continue to be provided with workable protections that can be used to control the flow of unwanted telephone solicitations to their homes. On the other hand, it **is** essential that such protections be carefully crafted to avoid interfering with the practices and needs of legitimate business enterprises which **the** FCC notes may generate more than $600 billion in sales from telemarketing each year. **As** a general matter, the Existing Rule attempts to strike a balance between these

[1] **MasterCard is a global membership organization comprised** of **financial institutions that are licensed to use the MasterCard service marks in connection with a variety** of **payments systems.**

important interests. In this regard, the Existing Rule requires each telemarketer to maintain a list of consumers who do not wish to be called by that telemarketer for marketing purposes. In doing so the Existing Rule enables consumers to selectively determine those companies that may not telemarket to them while continuing to permit telemarketing calls from companies the consumers believe may provide beneficial offers. In short, this approach enables a consumer to stop telemarketing calls from companies the consumer is not interested in while continuing to receive calls from others.

In the Proposal, the FCC invites comment whether a central do-not-call registry should be created under which consumers could "opt-out" of all telemarketing calls with a single communication rather than being required to opt-out on a company-by-company basis. The creation of such a central registry raises a significant number of challenging issues for the FCC, consumers and legitimate businesses. These issues require careful study before any final changes are adopted. For example, there are concerns about how to protect the information in a necessarily publicly available do-not-call registry from those who would use the information in connection with defrauding or doing even greater harm to consumers. Also, of major importance to legitimate telemarketing businesses is the need for an exemption for contacting existing customers. In addition, unless the central do-not-call registry preempts other federal and state do-not-call requirements, it would only add complexity to the already balkanized do-not-call requirements that exist today.

As a result of these and other significant issues raised by the Proposal, we urge the FCC to carefully deliberate before adopting any revisions to the do-not-call provisions of the Existing Rule. In addition, it is critically important that any such changes be coordinated with the Federal Trade Commission's ("FTC") which is in the process of considering similar amendments to its Telemarketing Sales Rule ("TSR). The following sets forth MasterCard's more specific comments on the Proposal.

SPECIFIC COMMENTS

Company Specific vs. Centralized Do-Not-Call Approaches

Under the TCPA, the FCC was directed to "initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations *to* which they object." In response, the FCC adopted the Existing Rule which includes the requirement that a telemarketer must maintain a list of consumers who have informed the telemarketer that they no longer wish to receive telemarketing calls. As part of the Proposal, the FCC is requesting comments regarding the overall effectiveness of this approach. In particular the FCC is inquiring whether the Existing Rule

provides consumers a reasonable means to curb unwanted telephone solicitations.

The Existing Rule establishes an effective framework for implementing the Congressional objective set forth in the TCPA. In this regard, the TCPA focuses on the need to protect consumers by ensuring they can avoid receiving those "telephone solicitations to which they object." The Existing Rule provides this protection to consumers by empowering them to stop unwanted calls from certain telemarketers while retaining the ability to receive calls from telemarketers who may provide goods or services which may be of interest.

The opt-out approach set forth in the Existing Rule is a reasonable one. It allows consumers to stop calls from a telemarketer with a simple oral communication. It also affords some protection to legitimate telemarketers by increasing the likelihood that a consumer's decision whether to opt out with a legitimate telemarketer will be based on the consumer's experiences with that telemarketer. For example, a legitimate telemarketer may be able to reduce its opt-out rate and thereby obtain a competitive advantage by crafting its telemarketing practices to be more consumer friendly. On the other hand, telemarketers that use less acceptable telemarketing practices are likely to have a higher percentage of consumers opting out of future calls.

The Proposal invites comment as to whether the FCC should change this company-specific approach by establishing a centralized do-not-call registry. Mastercard recognizes that some percentage of consumers do not wish to receive telemarketing calls, and Mastercard strongly supports the right of those consumers to exercise that choice. We are concerned, however, that the creation of a central registry raises a number of difficult challenges which must be addressed before any such approach is adopted.

A number of these challenges were taken into consideration by the FCC when it rejected the centralized registry approach as part of its deliberations on the Existing Rule. For example, when the FCC adopted the Existing Rule in 1992, it noted that the creation and maintenance of a centralized do-not-call registry would be costly, and that such costs could ultimately be passed on to the consumer.

As part of the Proposal, the FCC has renewed its consideration of this issue and has asked for estimates of the cost of establishing and maintaining a central do-not-call registry. In response, we note that it is probably too early to accurately assess such costs because they are difficult to estimate without knowing how the registry would operate. The costs could vary substantially, for example, based on the methods provided for consumers to place themselves on the registry (*e.g.* by telephone, mail, and/or Internet or other electronic means), how often the registry is updated, and how the FCC intends to handle consumer inquiries. The number of consumers requesting to be placed on the registry would also affect its cost. Although cost cannot be calculated with any accuracy at this point, it may be worth

noting that many of the commenters responding to a similar request from the FTC believed that the registry as proposed by the FTC would cost significantly more than the *$5* million estimate provided by the FTC.

As part of its original deliberations on the do-not-call issue, the FCC also recognized that it would be difficult to maintain a central registry in a reasonably accurate form since nearly 20% of all telephone numbers change in a given year. This issue is still relevant today. There are other basic practical issues such as how the FCC will handle what many predict will be a substantial volume of do-not-call requests. States that have adopted their own do-not-call lists have experienced difficulties in this area as evidenced by press reports from the recent past. The difficulties include handling the volume of calls and enforcing the requirements.

Moreover, it is unclear how to efficiently build a sufficient staff to respond to the consumer inquiries that inevitably would arise as consumers attempt to familiarize themselves with the do-not-call registry. A central registry also would face challenges with respect to compiling, storing, and presenting the do-not-call registry in a manner which is usable to the vast array of different businesses that will be called upon to comply with the Proposal.

The concept of a central do-not-call registry raises far more difficult issues as well. For example, how would the FCC protect the information in a do-not-call registry from those who would use it in connection with defrauding consumers or perpetrating even greater harms?

Also, it is inevitable that a central do-not-call registry would impose the most significant inequities on legitimate telemarketing businesses. As a practical matter, the centralization of the do-not-call process means that unscrupulous telemarketers who cause a high volume *of* consumers to participate in the do-not-call registry would do great harm to legitimate businesses that, through no fault of their own, would be prevented from making legitimate telemarketing calls to those consumers. This concern would be exacerbated greatly if the centralized registry interfered with the ability of legitimate businesses to telemarket their existing customers who have added their names to the registry.

Moreover, although the FCC is focusing on a "central" do-not-call registry, the Proposal would complicate, rather than centralize, the do-not-call process unless other do-not-call requirements are preempted. In this regard, without preemption the Proposal would add yet another layer to the already complex process for determining which individuals have opted out of telemarketing. Telemarketers currently are subject to at least two federal do-not-call requirements (*i.e.*, under the Existing Rule and the TSR) and there are numerous state telemarketing laws, some of which establish state-by-state do-not-call lists. Many telemarketers also voluntarily participate in industry do-not-call lists. This means preemption is essential in order to ensure that telemarketers are not required to

examine multiple databases, with different information and inconsistent formats, just to determine whether a marketing call may be placed to an individual.

In view of many complex issues involved in developing a central do-not-call registry, there are significant questions about whether mandating such a registry at the federal level is workable. If the FCC, nevertheless determines to pursue this matter, it is critically important that the FCC at least address the following two issues.

First, in order to avoid inappropriate consequences for legitimate businesses, any do-not-call registry must contain an exemption allowing businesses to contact their existing customers. A variation of this approach is part of the Existing Rule, and many states have adopted similar exemptions. Moreover, in order to preserve the synergies that the financial modernization provisions of the GLBA were designed to create, it also would be important to ensure that the existing customer exception enables the entire corporate family to contact a customer if one of its members has a customer relationship with the individual.

Second, any attempt to establish a central do-not-call registry is likely to be counterproductive unless it preempts state do-not-call provisions and releases businesses from the responsibility of maintaining company-by-company do-not-call lists under the FTC's and FCC's rules, In this regard, neither consumers nor legitimate businesses are well served by a scheme in which large numbers of databases must be consulted as part of every telemarketing program.

Funding a Central Registry

As part of the Proposal, the FCC has requested comment regarding how the costs associated with a centralized do-not-call registry could be recovered in view of the TCPA's prohibition on charging consumers a fee. Once again, it may be premature to fully assess cost issues regarding a central registry until more is known about how the registry would work. Nonetheless, as a general matter, the most appropriate way to fund a centralized registry may be to do so using general tax revenues. In this regard, the primary purpose for considering the centralized registry is to serve the needs of the general public. In other words, the centralized registry is meant to serve the public at large, not any particular group. As such any centralized registry should be funded in the same manner that is used to fund other general services -- through tax revenues.

We also note that some, including the FTC, have suggested that a centralized registry could be funded by imposing a fee on those telemarketers who are required to access the registry. Mastercard respectfully notes that this approach may be particularly inequitable for legitimate businesses. For example, the implementation of a central registry may decrease the value of telemarketing for many legitimate telemarketers and sellers as compared to telemarketing under

current law. As noted above, current law allows consumers to prevent specific companies from telemarketing to them. The registry, however, is essentially an all-or-nothing approach which will not reward companies for engaging in reasonable and consumer-friendly telemarketing practices. Rather, legitimate companies are likely to suffer on account of less appealing telemarketers driving consumers to place their telephone numbers on the registry. Requiring legitimate companies to pay fee to subsidize that result would appear to be difficult to justify.

Issues Regarding Predictive Dialers

The FCC has requested comment whether a predictive dialer is an "automatic telephone dialing system," or "autodialer," for purposes of the TCPA and Existing Rule. An autodialer is defined in the TCPA and Existing Rule as equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers. Under the Existing Rule, an autodialer may not be used to initiate a telephone call, with limited exceptions, to any emergency telephone line, the telephone line of any hospital guest room, or any telephone number assigned to a cellular telephone service or any service for which the called party is charged for the call.

We believe that a predictive dialer does not meet the definition of autodialer. A predictive dialer is a program that dials consumers' telephone numbers in a manner and at a rate that increases the likelihood that a telemarketing sales person will be available at the same time the consumer answers the phone. Predictive dialers generally do not store or generate telephone numbers to be called using a random or sequential number generator. Rather, the primary function of a predictive dialer is to call a given set of telephone numbers at a rate that enables a sales person to be available to handle the call when the consumer answers the phone. Moreover, a key purpose of the FCC's autodialer rule -- to prevent autodialers from randomly calling an emergency line, hospital room, or a telephone for which the called party is charged for the call -- does not appear to be relevant in the context of predictive dialers. In this regard, predictive dialers are generally used to dial numbers the telemarketer intends to call, not those randomly generated which may include hospital rooms, etc. Mastercard is unaware of significant problems associated with the use of predictive dialers in connection with calling these types of restricted telephone numbers.

In the Proposal, the FCC also requests comment whether changes are necessary to address the problem where a predictive dialer is used to initiate a call to a consumer but a telemarketing sales person is not available when the consumer answers the phone. The FCC notes that this can result in consumers hearing "dead air" or being disconnected. While the misuse of predictive dialers can result in consumer frustration, we do not believe the FCC should hold the industry to a standard that does not allow for the reasonable use of predictive dialers. If the FCC determines that limiting the number of abandoned calls as a

result of predictive dialers is necessary, we urge the FCC to study current industry practices to determine an appropriate rate of abandoned calls. Such a rate should be crafted so that it is flexible enough to allow businesses to use predictive dialers in a responsible and meaningful way, while also preventing irresponsible use of predictive dialers.

As an alternative to setting a maximum abandonment rate, the Proposal seeks comment on whether requiring telemarketers who use predictive dialers to also transmit caller identification information is a feasible option. The FCC states that with such information consumers would be able to identify the number of the calling entity and arguably be better able to hold telemarketers accountable for their practices. We believe the most appropriate method to mitigate the problems associated with abandoned calls is to limit the number of abandoned calls permitted. However, if the FCC intends to pursue a different approach, we do not believe that requiring telemarketers who use predictive dialers to transmit caller ID information would be feasible or appropriate. For example, many telemarketers do not necessarily use telephone services that are capable of transmitting caller ID information, We do not believe it would be appropriate for the Existing Rule to be amended in a manner that is not technology neutral, requiring telemarketers to use only certain types of telephone service providers. Furthermore, such an approach would have limited effect because it would benefit only those consumers who subscribe to caller ID services.

The TCPA Private Right Of Action

The TCPA provides that an individual may file suit in state court if he or she has received more than one telephone *call* in any 12-month period by or on behalf of the same telemarketer in violation of the existing Rule. The Proposal indicates that the FCC has received inquiries about a consumer's right to file suit against a telemarketer that has made a single phone call to that consumer in violation of the TCPA. The FCC has asked whether it should clarify whether a suit may be filed after a single violation.

Mastercard does not believe that any clarification is necessary. The plain language of the TCPA is clear on this point and states that a "person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the TCPA Rule may file suit if otherwise permitted by the laws or rules of court of a state.

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Once again, Mastercard appreciates the opportunity to comment on the Proposal. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to

call me, at the number indicated above, or Michael F. McEneney, at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

Joshua L. Peirez
Assistant General Counsel

cc: Michael F. McEneney, **Esq.**